R. Jaq's Dairs 1–13 Argued Oct 14– 15

Bradley & Wade

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~235.~~ 25

FRANCIS DAINESE, PLAINTIFF IN ERROR,

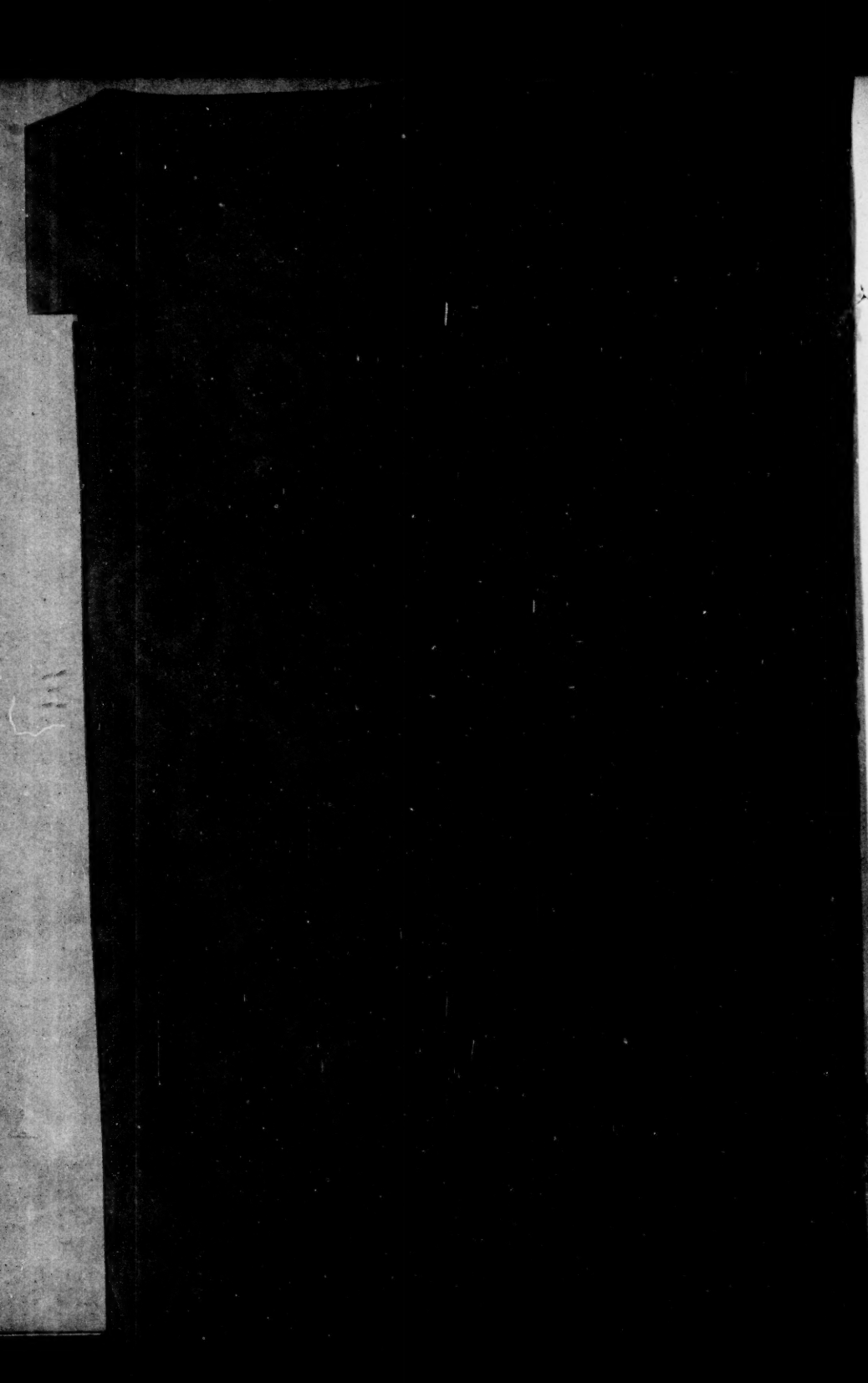
vs.

CHARLES HALE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

**FILED OCTOBER 13, 1873.**

Reversed



# SUPREME COURT OF THE UNITED STATES.

## No. 235.

FRANCIS DAINESE, PLAINTIFF IN ERROR,

vs.

CHARLES HALE

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Declaration | 3 | 1 |
| Summons | 13 | 4 |
| Marshal's return | 14 | 4 |
| Plea | 14 | 4 |
| Demurrer | 16 | 5 |
| Joinder in demurrer | 17 | 5 |
| Proceedings of special term | 18 | 6 |
| Proceedings of court in general term | 19 | 6 |
| Writ of error | 21 | 6 |
| Bond for writ of error | 22 | 7 |
| Clerk's certificate | 23 | 8 |

3 The answer of the chief justice and justices of the supreme court of the District of Columbia within named.

The record and proceedings whereof mention is within made follow in these words, to wit:

*Declaration.—Filed April 30th*, 1872.

In the supreme court of the District of Columbia, April 30, 1872.

FRANCIS DAINESE, PLAINTIFF, *v.* CHARLES HALE, DEFENDANT. } At law, No. 9615.

The plaintiff, Francis Dainese, a citizen of the United States and resident of the District of Columbia, sues Charles Hale, the defendant, for that whereas the plaintiff on or about the 23d day of November,
4 1864, was possessed of certain goods, wares, and merchandize, a schedule of which is hereto attached, marked "A," then stored and situate in the city of Alexandria, and country of Egypt, and at Tantah and Murich in said country, which were then and there of great value, to wit, of the value of sixty-nine thousand three hundred and sixty-six dollars and sixty cents lawful money of the United States.

And for that whereas the plaintiff, on or about the said 23d day of November, 1864, was the owner of divers credits and choses in action, a schedule of which, marked B, is hereto attached, of great value, to wit, of the value of forty-nine thousand three hundred and twenty-three dollars and fifty cents, lawful money of the United States, the same being claims, credits, and rights in action against divers persons residing respectively in said cities and country of Egypt, who were then and
5 there solventable, and willing to pay the same.

And for that whereas the defendant, a citizen of the United States, was on and after the 17th day of September, 1864, and until recently; agent and consul-general of the United States in said country of Egypt, and as such, was clothed with great power as towards the local government, over the persons and property of those belonging to the flag he represented, but in point of fact possessing none of the powers and duties of *of* the civil magistrate as between citizens of the United States resident within the United States; and yet, in usurpation and abuse of his said power, and for the malicious purpose of injuring the plaintiff in his fortune and estate, the defendant did take cognizance of a certain controversy between the plaintiffs, Richard Haud, Anthony B. Allen, citizens of the United States residing therein, neither the plaintiff nor either of the said Allens being at the time of the com-
6 mencement of said proceeding, nor during the pendency thereof, residents of, nor temporarily sojourning within, the Turkish domnions, and did, under a pretended order of attachment pronounced and ordained by himself, seize and attach the said goods, wares, and merchani dize of the plaintiff; and did, by notice of garnishment under the said pretended order and other malicious machinations, interpose, and prevent the timely collection and settlement by the plaintiff of the said claims, credits, and choses in action; and so in this wise did willfully, unlawfully, and maliciouly, and under color alone of his said office and of the said pretended proceedings in attachment, seize, take, and distrain the said goods, wares, and merchandize, and prevent the collection and settlement of the said claims, credits and choses in action, and the sale

of said goods; and did then and there, to wit, on or about the said 23d day of November, 1864, and on divers other days and times between
7 that day and the date hereof, at the cities and country aforesaid, without right or authority of law, keep and detain the same for a long space of time, to wit, for the space of eleven hundred and sixty days then next following, whereby the plaintiff for and during all that time lost and was deprived of the use of his said goods, wares, and merchandise, or the power to sell and dispose of the same, and thereby they then and there became and was greatly damaged and lessened in value; and the said claims, credits, and rights in action, by reason of the intervening insolvency, nomadic habits and unstable character of the said debtors of the plaintiff, were irretr'ev*ea*bly lost.

The plaintiff claims judgment of the value of the said goods and chattles, credits and rights in action, money and securites for money, books, and papers, with mesne profits and damages, which he estimates at one hunded and twenty-five thousand dollars besides costs.

HINKLE & ARRICK,
8 F. P. CUPPY,
*Att'ys for Plaintiff.*

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

HINKLE & ARRICK,
F. P. CUPPY,
*Atty's for Plaintiff.*

April 30, 1872.

A.

1 trunk and 2 carpet-bags containing clothing.
1 uniform hat & box, & 1 uniform sword.
1 box containing a complete rifle with apparatus.
2 pair pistols & 4 packages cartridge, caps, &c.
1 spy-glass, 2 opera-glasses.
4 consular arms.
1 demijohn cont'g 10 gallons old Malvoisie.
1 do " 5 " old brandy.
1 do " 5 " old Cypers.
1 do. " 5 " Lebanon Wine.
9 1 dozen bottles old Cypers wine.
2 " " cognac & Madeira.
1 " " old elixir chadtreuse.
10 " " table wine.
1 "invalid chair,' and books and papers.
2 cotton gins, iron.
40 bee-hives.
1 box carpenter's tools.
5 boxes of 4 cans each, petroleum.
386 boxes of 2 cans each, "
1 large & 6 apparatus thresher, with shifter, seperator, &c.
7 1 " & apparatus, Fields power complete.
3 boxes door-knobs, (31 doz.)
3 boxes gaiters, (12 doz.)
3 kegs nails.
4 trucks, wheeling trucks.

8 pieces garden utensils.
72 plows complete.
2 iron mills.
7 straw-cutters.
3 coffee roasters.
6 cans of crackers.
10 4 nurseries.
18 doz. graters.
9½ doz. chairs, (cane.)
28 pieces of iron bedsteads.
6 complete cottage sets.
4 " ice-cream freezers.
6 pieces folding ladders
5 small corn-shellers.
3 complete buggies, harness, &c.
7 complete carriages, harness, &c.
6 pumps & 6 powers, } Perry pumps with pow'r.
5 threshers & 5 powers, } Wheeler's threshers & pow'r.
1 mill, farming mill.
1 mill-stone, 30 inches.
2 mills, do 15 & 18 inches.
1 smut-machine.
1 saw do.
2 power iron corn-shellers.
15 ox-chains.
3 hand-gins.
11 Lot of ham and beef.
Ice-house laid on Mr. Raller.
15 cotton-gins.
4 hand-gins.
4 rockers.
6 chairs, (cane)
6 iron bedsteads.
7 gigs.
2 ice-freezers, & 6 boxes petroleum.
6 folding ladders 10 f't.
3 gigs, No. 37, 37, 38.
2 do. No. 35, 36.
1 do. No. 34.
4 do. No. 39.
66 umbrellas.
2 bedstead-rockers, stuffed.
8 folding ladders 92 feet.
1 cottage set complete.
1 do. marble top, fine.
12 iron bedsteads.
6 gigs.
2½ doz. chairs, cane.
10 rockers.
12 150 corn-shellers.
50 do. do.
1 Arabian mare.

B.

| | | | |
|---|---|---|---|
| Three several acceptances by Theodosio Hagi Christo, for £230, £550 15s. and £1,000 | £1,785 | 15 | 0 |
| Rigadis and Constantinidis' acc't at Alexandria, for advances to Deamandidi's estate | 400 | 00 | 0 |
| N. Dariotti's account of Rorto Said | 221 | 4 | 0 |
| A. C. Paugaloki's account, Alexandria | 8 | 9 | 0 |
| Palloni's account, Alexandria | 677 | 15 | 0 |
| Atlanas J. Diamandodis, Alexandria | 8 | 18 | 5 |
| Hassan's account, Alexandria | 17 | 12 | 0 |
| Hassan Pasha's account, Alexandria | 70 | 0 | 0 |
| Foulfikar Pasha's account, Alexandria | 100 | 0 | 0 |
| Ibrahim Arcasti's do. do. | 174 | 7 | 5 |
| D. Dahan's account, Tanta | 129 | 18 | 0 |
| Kendeneco's account by Ioannovich | 550 | 0 | 0 |
| 13 Kahil's account, Cairo | 562 | 0 | 0 |
| Interest on the sums above is due | £4,675 | 18 | 10 |

*Summons.—Issued April* 30, 1872.

In the supreme court of the District of Columbia, the 30 day of April, 1872.

FRANCIS DAINESE, PLAINTIFF,
*v.*
CHARLES HALE, DEFENDANT. } At law. No. 9615.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL OF COURT.] R. J. MEIGS, *Clerk.*
HINKLE.

14 NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

*On back.*

Served copies of the declaration, notice to plead, and this summons, on the defendant, the 1st day of May, 1872.

A. SHARP,
*U. S. Marshal of D. C.*

*Plea.—Filed May* 18, 1872.

In the supreme court of the District of Columbia, May , 1872.

FRANCIS DENAISE, PLAINTIFF,
*vs.*
CHARLES HALE, DEFENDANT. } At law. No. 9615.

Plea of defendant.

15 And for plea to the said declaration, the said defendant says

that, at the time of the several trespasses and grievances in the said declaration alleged, he was agent and consul-general of the United States at Alexandria, in Egypt; that he was furnished with a letter of credence from the President of the United States to His Highness the Pasha ot Egypt; that in his capacity of agent and consul-general, and holding the highest deplomatic rank of any representative of the United States in the country to which he was accredited, he exercised, by virtue of the laws of the United States, the functions and duties of a minister; that as such agent and consul-general, by the law of nations, as well as the laws of the United States, he was invested with judicial functions and power over citizens of the United States residing in said country of Egypt; that in the exercise of said judicial functions and powers, and in his capacity of agent and consul-general as aforesaid, he took cognizance of the said cause of Richard H. and
16 Anthony B. Allen versus the said plaintiff, he, the said Dainese, having a stock of goods then in store in Egypt, and issued the said order of attachment in the said plaintiff's declaration alleged, under and by virtue of which the said proceedings in said declaration alleged were had; that this, and none other, is the pretended trespasses and grievances in the said declaration alleged; and that for the acts and doings of this defendant in the exercise of said judicial functions in his capacity of agent and consul-general of the United States as aforesaid, he is liable only to the United States and the laws thereof, and not to the said plaintiff; and this he is ready to verify, wherefore the defendant prays judgment.

W. PENN CLARK,
*Attorney for Defendant.*

*Demurrer.—Filed May* 28, 1872.

17 In the supreme court of the District of Columbia, May 28, 1872.

FRANCIS DANAISE, PL'FF, }
*v.* } At law. No. 9615.
CHARLES HALE, DEF'T. }

Demurrer to def't's plea.

1st. The plaintiff says the plea of the defendant is bad in substance.

HINKLE & ARRICK,
*Att'ys for Pl't'ff.*

The plaintiff will argue that no such powers as those set up in the plea was conferred upon the def't, either by the laws of nations or by the laws of the United States, and that in committing the grievances complained of he exceeded his authority, and acted maliciously.

H. & A., *Att'ys.*

*Joinder in demurrer.—Filed June* 1*st*, 1872.

18 In the supreme court of the District of Columbia, June 1st, 1872.

FRANCIS DANAISE, PL'FF, }
*v.* } At law. No. 9615.
CHARLES HALE, DEF'T. }

Joinder in demurrer.

Comes now the defendant and says, that the said plea to which the said plaintiff hath demurred is good in substance and in law.

W. PENN CLARKE,
*Att'y for Def't.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for the said district, commencing on the fourth Monday, 27th day of January, A. D. 1873.

MONDAY, *January* 27, 1873.

By order of Chief-Justice Cartter, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of court.

19 SATURDAY, *April* 12, 1873.

Session resumed pursuant to adjournment. Chief-Justice Cartter presiding.

FRANCIS DAINESE, PL'FF, *v.* CHARLES HALE, DEF'T. } At law. No. 9615.

This cause came on to be heard on the demurrer of the plaintiff to the plea of the defendant, and was argued by counsel; in consideration whereof it is ordered and adjudged that the demurrer be overruled, from which said judgment overruling said demurrer to said plea the plaintiff prays an appeal to this court in general term, which is allowed, and said appeal taken accordingly.

Proceedings before the supreme court of the District of Columbia in general term, commencing on the third Monday, 21st day of April, 1873.

Present, Justices Olin, Wylie, Humphreys, and MacArthur.

20 SATURDAY, *June* 7, 1873.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

FRANCIS DAINESE, PL'FF, *v* CHARLES HALE, DEF'T. } At law. No. 9615. Cal. 44.

And now come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court that the defendant's plea to the declaration is good in substance, therefore it is considered that the judgment of the circuit court overruling the plaintiff's demurrer thereto be, and the same is affirmed, and that the defendant have judgment against the plaintiff for his costs of suit, taxed at $ .

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Fran-

cis Dainese, pl'ff, and Charles Hale, defendant, No. 9615, a manifest error hath happened, to the great damage of the said Francis Dainese, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate-justice of the Supreme Court of the United States, this 29 day of September, in the year of our Lord 1873, and of the Independence of the United States the 98th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

TO CHARLES HALE:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Francis Dainese is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

[SEAL.] D. K. CARTTER, *Ch. Just.*

Service acknowledged this 29th day of September, A. D. 1873.

W. PENN. CLARK,
*Att'y for Appellee.*

22 In the supreme court of the District of Columbia, the 29 day of August, 1873.

FRANCIS DAINESE *vs.* CHARLES HALE. } At law. No. 9615, in error.

Know all men by these presents, that we, Francis Dainese and Charles V. Gordon, are bound unto the above-named Charles Hale in the sum of two hundred and fifty dollars, to be paid to the said Charles Hale, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 29th day of August, 1873.

Whereas the above-named Francis Dainese hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia;

Now, therefore, the condition of this obligation is, that if the above-named Francis Dainese shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

F. DAINESE. [SEAL.]
CHA'S V. GORDON. [SEAL.]

Sealed and delivered in presence of—
FRANKLIN TENNEY.

Approved this 29th day of September, 1873.

D. K. CARTTER,
*Chief-Justice.*

23 OFFICE OF THE CLERK OF THE
SUPREME COURT OF THE DISTRICT OF COLUMBIA,
*September 29th*, 1873.

I certify that the foregoing is truly copied from originals on file, and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia in the case mentioned in the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year aforesaid.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk.*

(Indorsement on cover:) No. 235. Francis Dainese, plaintiff in error, vs. Charles Hale. District of Columbia sup. c't. Filed 13th October, 1873.

# Supreme Court of the United States.

No. 235.

---

FRANCIS DAINESE

*vs.*

CHARLES HALE.

---

## Statement of the Case.

The defendant, Charles Hale, in the year 1864, and for several years thereafter was Consul General of the United States in Egypt. In the month of November, 1864, the plaintiff, Francis Dainese, had in store in the city of Alexandria and at Tantah and Minieh, in Egypt, goods, wares and merchandise, which he estimates at the value of sixty-nine thousand three hundred and sixty-six dollars and sixty cents; and that he was the owner of divers credits and choses in action in said country of Egypt, amounting to $49,323.50. The same being claims, credits and rights in action against divers persons residing respectively in the said cities and country of Egypt, who were then and there solvent, able and willing to pay the same.

The defendant, as such consul, issued process of attachment and garnishment against the said goods and credits of the plaintiff at the suit of Richard H. and Anthony B. Allen. That his goods were seized on this process and detained from him for eleven hundred and sixty days, and were greatly damaged and lessened in value by reason of such seizure and detention; and his claims, credits and rights in action, by reason of the intervening insolvency, nomadic habits, and unstable character of his debtors, were irretrievably lost.

That the plaintiff and the Allens were all citizens of the United States, residing therein, and that neither the plaintiff nor either of said Allens was at the time of the commencement of said proceedings, nor during the pendency thereof, residents of, nor temporarily sojourning, within the Turkish dominions. The plaintiff charges that these attachment proceedings were unlawfully and maliciously instituted and prosecuted by the defendant.

The defendant in his plea admits that he issued the attachment and caused the proceedings charged in the declaration.

But he claims that as such Consul-General, by the laws of nations, as well as by the laws of the United States, he was invested with judicial powers over citizens of the United States residing in said country of Egypt; and that for his acts and doings in his capacity of Consul-General, he is liable only to the United States and the laws thereof, and not to the plaintiff.

To this plea the plaintiff demurred, and the Court below overruled the demurrer, and gave judgment for costs against the plaintiff.

---

## Assignment of Errors.

The overruling of said demurrer, and the rendering of the judgment against the plaintiff as aforesaid, constitute the errors assigned and complained of by the plaintiff.

---

## Plaintiff's Brief.

The question made by the record, is whether, in 1864, the Consul General of the United States in Egypt, was clothed with the judicial powers to do the acts complained of. The defendant claims that he was invested with such powers, both by the law of nations, and the laws of the United States.

1st. Is a Consul invested with judicial powers by the law of nations?

The consular office is an institution of modern times, and hence is not treated of by the earlier writers upon international law.

Vattel says, Book II, p. 147, sec. 34: "Among the modern institutions for the advantages of commerce, one of the most useful is that of consuls, or persons residing in the large trading cities, and especially the seaports of foreign countries, with commission to watch over the rights and privileges of their nation, and to decide disputes between her merchants there. When a nation trades largely with a country, it is necessary to have there a person charged with such a commission; and as the State which allows of this commerce must naturally favor it, for the same reason also it must admit the consul. *But there being no absolute and perfect obligation to this*, the nation that wishes to have a consul, *must procure this right by commercial treaty itself.*" "The consul is no public minister, and cannot pretend to the privileges annexed to such a character."

And again, book 4, Chap. 6, Sec. 75, he says: "We have spoken of consuls in treating of commerce. Formerly *agents* were a kind

of public ministers, but in the present increase and confusion of titles this is given to persons simply appointed by princes to transact their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers and consequently not under the protection of the laws of nations."

Halleck's International Law, p. 239: "The institution of the foreign consulate originated in the earlier part of the middle ages, in sending officers or persons from one country or city to the seaports and towns of foreign States for the purpose of protecting the national commerce, especially in matters of shipwreck, and of adjusting disputes between sailors and merchants of their own country. In the absence of regular ambassadors or other public ministers, these commercial agents sometimes acted in the capacity of representatives and diplomatic agents of their respective States, and not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries in foreign ports and cities. In the ports of the Baltic and Mediterranean, where foreigners were compelled to live in particular quarters of the town, they sometimes exercised great power over their own countrymen, and were designated by various titles, according to the customs of various countries.

"In the early part of the seventeenth century a great change was effected in commerce and international intercourse generally by the establishment of permanent diplomatic agencies and legations, by the general improvement of municipal law, and especially by more clearly defining the boundaries and limits of territorial and foreign jurisdiction. The extra-territorial jurisdiction, criminal and civil, exercised by consuls was found to be wholly at variance with the recognized principles of public law in Christian Europe, and the consular institution, thus changed in its condition and character, was limited to a general vigilance of the consul over the interests of shipping and navigation of his nation at a particular locality. To this was sometimes added a limited authority over particular questions of dispute between merchants and sailors of his own country. This is the general position which in Christian countries the consulate continues to occupy at the present day. The duties and legal *status* of consuls, as will be shown hereafter, are somewhat different in the east, where, by virtue of *express treaty stipulations*, they have especial prerogatives and exercise a larger jurisdiction."

At page 255 the same author says "as already remarked, the powers, privileges and immunities of European and American consuls, in Mohammedan and unchristian dominions, are very different from those of consuls in Christian Countries. This has resulted in part from their having there retained the general diplomatic character and prerogatives of jurisdiction, which in earlier times they possessed everywhere, and in part from the stipulations

of treaties. Thus the Sultans of Turkey have conceded to the consuls of christian powers authority to exercise jurisdiction over their fellow countrymen in Turkey, which, by the general rule of international law of Christian States, belongs to the territorial sovereign—such jurisdiction both civil and criminal, being conceded to the consuls over their countrymen, to the exclusion of the local magistrates and tribunals, *it depends upon the laws of their own States how it shall be exercised, and what penalties and punishments may be imposed or inflicted. And in civil cases this jurisdiction is ordinarily subject to an* appeal to the superior tribunals of their own country, and in criminal cases the prisoners are sometimes sent home for trial and punishment, especially if the punishment exceeds the infliction of pecuniary penalties. *This however depends upon the laws of their own country regulating such proceedings.*"

The same author at page 251 says "The duties of consuls are regulated in a great measure by the laws of their own country, subject of course to the general principles of international jurisprudence. Thus although according to the doctrine laid down in the preceding paragraphs, they can exercise *no contentious jurisdiction* over their fellow countrymen without *the express permission of the State in which they reside*, they are nevertheless allowed a sort of voluntary jurisdiction—a power of arbitration in certain kinds of disputes, more especially those relating to matters of commerce. For example, in difficulties between the captain and seamen of a merchant vessel of his own country, *the consul may be empowered by his own State* to discharge a seaman for cruel treatment or other sufficient cause, and such discharge, though not binding upon the tribunals of the place of his residence would be upon those of his own country. The same may be said of disputes between the captain and supercargo, between them and the consignees, or between the consignees themselves. *But these special powers of a consul belong rather to the municipal laws of his own State, than to international jurisprudence.*"

Wildman's Int. Law, p. 130:

"Consuls are the mercantile agents of sovereigns, by whom they are appointed to protect the commercial interest of their subjects in a foreign State. They are not public ministers, and have not exemption from the civil or criminal jurisdiction of the State wherein they perform their functions. They have authority to decide any differences which may arise between their own countrymen. But the jurisdiction they exercise is by permission of the sovereign in whose territory they reside, and his approval is necessary to perfect their appointment. *The extent of their jurisdiction is determined by treaty*, and in eastern States it has sometimes been allowed to an unlimited extent. Thus the treaty of Constantinople between Soliman and Francis 1 provides, that the French consuls at

Constantinople, Pera, and all other towns within the Ottoman dominions, shall have exclusive jurisdiction, both civil and criminal, over French subjects, and that their sentences shall be enforced by the officers of the Sultan."

In the case of the Anne, 3 Whea., 435, Mr. Justice Story says: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, entrusted by virtue of his office with authority to represent him in his negotiations with foreign States, or to indicate his prerogatives; there is no doubt but his sovereign may specially entrust him with such authority; but in such case, his diplomatic character, is superadded to his ordinary powers, and ought to be recognized by the governments within whose dominions he assumes to exercise it."

The William Harris, decided in 1837, in the District Court of Maine, Ware, 373, the Court say: "A consul has no authority to commit seamen to prison. The laws of the United States invest their consuls and commercial agents with certain powers to be exercised for the benefit and protection of American seamen when in foreign ports; as for the relief of destitute mariners and furnishing them with the means of returning home. *But no portion of the judicial powers of the United States is conferred on consuls.* They cannot take cognizance of the offences of seamen in foreign ports and sentence them to punishment."

It is believed that the foregoing citations fairly cover all the principles of the law of nations relating to foreign consuls involved in the consideration of this case; and from them we deduce these propositions, viz:

1st. That the consul is of comparatively modern origin, and grew out of the necessities of commerce.

2d. That originally the consul was merely a commercial agent, appointed to reside in a foreign port to look after the rights and interests of the merchants, seamen, and shipping of his country at the port in which he resided.

3d. That they grew to exercise "a sort of voluntary jurisdiction—a power of arbitration in certain kinds of disputes, more especially those relating to matters of commerce."

4th. This is the extent of the consular functions by the laws of nations. It is true that Halleck says, that "in the ports of the Baltic and Mediterranean, where foreigners were compelled to live in particular quarters of the town, they (the consuls) sometimes

exercised great powers over their own countrymen." But all these powers, beyond those growing out of the necessities of commerce, were derived from treaty stipulations and authority conferred by the sovereign appointing the consul by the consent of the sovereign in whose dominions the authority was exercised.

The defendant, then, was not by the law of nations justified in doing the things of which we complain. Was he by the laws of the United States?

To enable a consul to exercise judicial powers, two things are necessary:

1st. The sovereign of the country in which the consul resides must expressly grant the right to exercise such jurisdiction within his dominion, and

2d. The consul must be clothed with judicial powers by his own sovereign.

We now propose to show that the defendant's justification is wanting in both of these essential pre-requisites.

There are two treaties between the United States and the Ottoman Porte. The first was concluded on the 7th of May, A. D. 1830. (See 8th Stats. at Large, 409.

*a.* Article IV of the treaty of 1830 clearly defines the jurisdiction of American consuls, which is as follows:

"If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American Dragoman be present. Causes in which the sum may exceed five hundred piasters shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested; and even when they may have committed some offence they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks."

This article provides—

1st. For disputes between subjects of the Sublime Porte and citizens of the United States.

2d. For the trial of offences committed by citizens of the United States, in which cases jurisdiction is granted to the American Minister or Consul. The grant of jurisdiction to Consuls is clearly re-

stricted to criminal offences committed by American citizens; and all other jurisdiction not clearly and expressly granted must be taken as withheld.

There is certainly no grant of civil jurisdiction in this treaty. Let us examine the treaty ratified June 5, 1862. (12 Stats. at Large, 1213.)

The first article after confirming the rights conferred by the treaty of 1830 declares:

"It is, moreover, expressly stipulated that all rights, privileges, or immunities which the Sublime Porte now grants, or may hereafter grant to, or suffer to be enjoyed by, the subjects, ships, commerce, or navigation of any other foreign Power, shall be equally granted to, and exercised and enjoyed by, the citizens, vessels, commerce, and navigation of the United States of America."

Does Turkey in this article grant to the United States authority to establish civil courts within her dominions?

1. The treaty by its title purports to be a "Treaty of Commerce and Navigation," and all its articles, except the first, specifically relate to the rights and interests that are founded in commerce and navigation.

2. This article must be construed with reference to the subject-matter of the compact and the existing treaty of 1830.

3. The treaty nowhere makes mention of the subject of Consuls or consular jurisdiction.

4. The article quoted simply grants to the citizens, vessels, commerce and navigation of the United States the rights, privileges, and immunities which Turkey has granted or may grant to other foreign Powers; and this is especially apparent when viewed in the light of the rule of construction furnished by the twenty-first article of this treaty, which is as follows:

ARTICLE XXI.

"It is always understood that the Government of the United States of America does not pretend, by any article in the present treaty, to stipulate for more than the plain and fair construction of the terms employed, nor to preclude in any manner the Ottoman government from the exercise of its rights of internal administration where the exercise of these rights does not evidently infringe upon the privilege accorded by ancient treaties, or by the present treaty, to citizens of the United States or their merchandize."

The 21st article seems to have been inserted by the Turkish

Government to preclude the construction now placed upon the 1st article by the defendant; and the *surrender "of the right of internal administration" is expressly negatived*, except where the exercise of such rights would infringe upon the privileges accorded by ancient treaties or by the present treaty to the citizens of the United States or their merchandise. There was no ancient treaty save that of 1830, and in that there was a grant of criminal jurisdiction, but no grant of civil jurisdiction.

The right to establish tribunals for the administration of justice, either civil or criminal, in the Turkish dominions, by the United States, is a surrender of sovereignty *pro tanto* on the part of Turkey, and certainly cannot be implied from any language employed in the first article of the treaty of 1862, and could only be derived from a clear and express grant.

All the consent which Turkey has ever given to the United States to exercise judicial powers within her dominions is to be found in the articles of the two treaties which we have cited; and as we have seen, that consent has only extended to the grant of jurisdiction in *criminal* cases.

We maintain that it is wholly immaterial what exterritorial judicial powers were conferred by the laws of the United States upon our consul in Egypt unless the Sovereign of that country had consented to their exercise.

Chancellor Kent in his Commentaries, vol 1, Sec. 42, says:

"Consuls have been multiplied and extended to every part of the world, where navigation and commerce can successfully penetrate; and their duties and privileges are now generally limited and defined in treaties of commerce, or by the statute regulations of the country which they represent. In some places they have been invested with judicial powers over disputes between their own merchants in foreign ports; but in the commercial treaties made by Great Britain, there is rarely any stipulation for clothing them with judicial authority, except in treaties with the Barbary States; and in England it has been held that a consul is not strictly a judicial officer, and they have there no judicial powers. It has been urged by some writers as a matter highly expedient, to establish rules requiring merchants abroad to submit their disputes, to the judicial authority of their own consuls, particularly with reference to shipping concerns. *But no government can invest its consuls with judicial powers over their own subjects, in a foreign country, without the consent of the government of the foreign country, founded on treaty;* and there is no instance in any nation of Europe, of the admission of criminal jurisdiction in foreign consuls."

The defendant claims to have been vested with judicial powers, civil and criminal, by the Act of Congress, approved June 22, 1860. (Stats. at Large, Vol. 12, p. 72.)

The act is entitled "an act to carry into effect the provisions of the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, and other functionaries of the United States, *in* those countries, and for other purposes."

The preamble recites "that to carry into full effect the provisions of the treaties of the United States, with the empires of China, Japan and Siam, respectively, the ministers and consuls of the United States, duly appointed to reside in each of said countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the said offices of minister and consul, and be part of the duties, belonging thereto, *wherein the same is allowed by treaty.*"

The 2d section empowers these public functionaries to arraign and try all citizens of the United States "in the manner herein provided," charged with offences against law which shall be committed in such countries; and upon conviction to sentence, &c., and to issue all suitable and necessary process, &c.

The 3d section provides "that in regard to civil rights, whether of property or person, the said functionaries are invested with all judicial authority necessary to execute the provisions of such treaties, respectively, and shall entertain jurisdiction in matters of contract, at the port where, or nearest to which the contract was made, or at the port where, or nearest to which it was to be executed; and in all other matters at the port where, or nearest to which the cause of the controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, any such port above named, being always one of the ports at which the United States are represented by consuls; which jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively.

The 4th section provides that such jurisdiction in criminal matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, extended over all the citizens of the United States *in the said countries*, (and over all others to the extent that the terms of the said treaties respectively justify or require,) so far as such laws are suitable to carry the said treaties into effect; and in all cases where such laws are not adapted

another nation or class of nations cannot operate as a grant or permit to the United States to establish consular courts within the Ottoman dominions.

The usages of Turkey "in its intercourse with the Franks and other foreign Christian nations" were founded upon treaty stipulations with the different countries of Christendom trading in her ports, and could not of course be the foundation for rights on the part of nations having no such treaties; nor could powers in derogation of the sovereignty of Turkey, be extended beyond the *express* concessions of the treaties themselves.

Wheat. Int. Law, part ii, Sec. 110:

"The municipal law and institutions of any State, may operate beyond its own territory and within the territory of another State by special compact between the two States."

"Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise over their own countrymen, a jurisdiction within the territory of the State where they reside."

*The nature and extent of this peculiar jurisdiction depend upon the stipulations between the two States.* * * * "The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily subject in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties."

In reply to an official communication from the Secretary of State, addressed to the Attorney-General, in 1855, Mr. Cushing, then Attorney General, gave an opinion, in which the jurisdiction of American Consuls in China and Turkey, is clearly defined. (Ops. Attys. Genl., Vol. 7, p. 495:) He discusses at great length the treaty with China and the treaty with the Ottoman Porte of 1830, and the act of 1848, conferring civil and criminal jurisdiction in the countries therein named. The 21st section of the act of 1860 is taken substantially from the act of 1848, and was section 22 in that act. (9 Stats. at Large, 276.) Mr. Cushing says on page 502 of this opinion, "It is observable that the Statute provides in terms for the exercise of judicial powers by the ministers and consuls in Turkey only, so far as regards the punishment of crime." (Sec. 22.) I think it is a defect, if not an oversight, in the act. *It leaves all questions of civil jurisdiction to the vagueness of the general analogies of public laws as applied to Franks in the Levant; what is to follow, therefore,*

*is only in part applicable to Turkey, and will be stated mainly as affecting China.*"

That Congress did not consider that the act of 1860 clothed the consul general in Egypt with judicial powers, at all events in civil cases, is apparent from the 11th Sec. of "an act making appropriations for sundry civil expenses of the Government for the year ending June 30, 1867, and for other purposes." 14 Stats. at Large, 310, Sec. 11, is as follows:

"That the provisions of the act to carry into effect the treaties between the United States and China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls or other functionaries of the United States in those countries, and for other purposes, approved June 22, 1860, shall extend to Egypt; and the consul general at Alexandria shall have the power prescribed by section twenty-two, of said act, for the consul general, or consul residing at the capital of a country where there is no minister."

This law passed in 1866, enacts "that the provisions of the act" of 1860, "*shall extend to Egypt.*" If the act of 1860 applied to Egypt, this was a work of sepererogation. It will not do to say that it was simply declaratory of the law, for it has none of the phraseology of a declaratory act. Congress manifestly intended to clothe the consul general in Egypt with powers that he did not before possess. The acts of '48 and '60 had each conferred judicial powers in *criminal* cases upon the ministers and consuls in the Ottoman dominions, as we have already seen; but jurisdiction in *civil* cases had been withheld indisputably in the act of '48, and we claim that by the act of '60 the consul was simply empowered to exercise, in addition to criminal, such civil jurisdiction as belonged to consuls by the law of nations, and none others, and of this opinion, must Congress have been, when it passed the act of 1866.

If the Act of '66 shall be held to be operative for this purpose, it is the defendant's misfortune that it was not passed until two years after the injuries we complain of were inflicted.

But admitting all the provisions of the Act of 1860, to have been in full and rigorous operation in Egypt in 1864, still the defendant could not justify his proceedings in the case made in the record.

The declaration charges, "and yet, in usurpation and abuse of his said power, and for the malicious purpose of injuring the plaintiff in his fortune and estate, the defendant did take cognizance of a certain controversy between the plaintiffs, Richard H. and Anthony B. Allen, citizens of the United States, residing therein,

neither the plaintiff, nor either of the said Allens, being at the the time of the commencement of said proceedings, nor during the pendency thereof, residents of, nor temporarily sojourning within the Turkish dominions, and did render a pretended order of attachment, "&c.

Now, all the parties to this attachment proceeding were citizens of the United States, residing therein, and neither of them was in Egypt at the commencement nor during the pendency of these proceedings.

The justification for investing these commercial agents with judicial functions, so foreign to the legitimate duties of their office, and for the discharge of which they are generally so illy qualified, is the supposed necessity of providing for the punishment of our own citizens for the commission of crimes, and for the determination of disputes and controversies arising between them while traveling, domiciled, or temporarily sojourning in Mohammedan and heathen countries. Our whole theory and fabric of consular courts are founded upon the necessities of our citizens *in* these countries, and can have no possible application to our citizens who are at home in their own country, where the legal and constitutional tribunals are always open and of easy access to them.

It may even be conceded that Turkey has granted the fullest civil jurisdiction to consuls, and that Congress has vested them with all the authority possessed by consuls in China, and yet the defendant's plea is bad, because the declaration shows that none of the parties to the proceedings instituted before said consul, were at the time said proceedings were commenced or at any time during the pendency of the same, residing in or even temporarily sojourning within the Turkish dominions.

The 4th Section of the Act of 1860, provides:

"That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, *extended over all citizens of the United States in the said countries*, (and over all others to the extent that the terms of the said treaties, respectively, justify or require,) *so far as such laws are suitable to carry the said treaties into effect.*"

Article 27 of the treaty with China, (Stat. at Large, Vol. 12, p. 1,029,) conceding to the United States the right to exercise jurisdiction in China, is as follows:

"All questions in regard to rights, whether of property or person, *arising between citizens of the United States in China*, shall be

subject to the jurisdiction and regulated by the authorities of their own government; and all controversies *occuring in China* between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such government, respectively, without interference on the part of China."

It is obvious that the grant of exterritorial, civil jurisdiction by China to the United States, is expressly limited to controversies "arising between citizens of the United States *in China*."

It could not be supposed that China intended to grant to the United States the right to establish courts of general jurisdiction within her territory, to which citizens of the United States at home in their own country, might send their litigations, if for any reason they preferred to do so, instead of resorting to the courts at home. The absurdity of the proposition is its best refutation.

On account of differences in religion, civilization and jurisprudence, the American Commissioner who negotiated the treaty, demanded that our own citizens, *while in China*, if they committed offences, or if *while there* disputes and litigations should arise between them, they might be tried, or controversies between themselves might be adjudicated upon the principles of our own jurisprudence and by our own agents. And to this extent the right to exercise jurisdiction was granted by China.

Congress has not undertaken to extend jurisdiction beyond the concession of the treaty. In the 4th Sec. of the act of '60 conferring jurisdiction the laws of the United States are "extended over all citizens of the United States *in the said countries;*" and in the 3d Sec. it is provided that "the said functionaries are hereby invested with all the *judicial authority necessary to execute the provisions of such treaties.*"

This, then, is the limit of the jurisdiction conferred by the treaty and by the act of Congress. It is confined to "*citizens* of the United States *in these countries*," and to the necessity to "*execute the provisions of such treaties.*"

But admitting the defendant to have been clothed with judicial powers, had he jurisdiction in attachment?

There is no attachment law of the United States, neither is attachment a common law remedy.

McQueen *vs.* Middleton Manufacturing Co., 16 Johns., 5; Clark *vs.* New Jersey Steam Navigation Co., 1 Story, 531; Monro *vs.* Al-

mida, 10 Wheat., 473. Whence, then, the authority to issue attachment?

The 4th sec. of the act of '60, provides that the laws of the United States shall be extended over our citizens, &c., "so far as such laws are suitable to *carry the said treaties into effect.*" But when there are no suitable remedies known to our law, then they are to resort to the common law, and in the absence of common law, "then they *shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies.*"

In short, if there be no law of the United States suitable, and no principle of the common law applicable, then, these *commercial agents*, "*are to be a law unto themselves.*" Now, as attachment is not provided for by the United States, nor the common law, it can find its authority only in the *will of the consul.*

Here, then, are these *commercial agents*, appointed without reference to legal acquirements or judicial experience, and perhaps not learned in the law at all, invested with powers such as are possessed by no Court in the United States, not even this High Tribunal,—*a power both to make and to execute the law.*

The power to make laws is exclusively in Congress.

Article 1 of the Constitution of the United States is, "*all* legislative powers herein granted, shall be vested in a Congress, which shall consist of a Senate and House of Representatives."

It has been repeatedly held that *legislative powers can not be delegated*, and we submit that this most *extraordinary* provision of the law of 1860, is a plain and palpable infraction of the Constitution of the United States.

Are ministers and consuls judges of the United States, and when in the exercise of the judicial authority vested in them by the 3d Section of the Act of 1860, are they Judicial Courts of the United States?

The 1st Sec. of the 3d Article of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior Courts as Congress, from time to time, may ordain and establish."

"The Judges of the Supreme and inferior Courts shall hold their offices during good behavior."

Ministers and consuls hold their offices during the pleasure of the President and not during good behavior. They cannot there-

fore be judges of the inferior courts authorized by the Constitution. Nor are these consular tribunals "Constitutional courts, in which the judicial power, conferred by the Constitution on the General Government, can be deposited. They are incapable of receiving it."—American Ins. Co. vs. Canter, 1 Peters, 511; 3 Abbott, 212.

But again, sec. 2, art. 3, of the Constitution provides that "the judicial power shall extend *to all cases in law and equity*, arising under this Constitution, the laws of the United States, *and treaties made, or which shall be made under their authority;* to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

Do not the "cases" in these consular courts necessarily "arise" under the Constitution, and laws of the United States, and under *treaties?* The treaty authorizing, and the laws of the United States conferring, the power, are the very foundation of the *jurisdiction.*

Moreover, the 3d section of the act of 1860 says: "The said functionaries are merely invested with all the judicial authority *necessary to execute the provisions of such treaties,*" and the 4th section says: "That such jurisdiction in criminal and civil matters, shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, *so far as is necessary to execute such treaties,*" &c.

Are not these the very "cases" confided by the Constitution to the Courts in which is deposited the "judicial power" of the United States? And is not that judicial power confined to "the Supreme Court, and such inferior Courts as Congress from time to time may ordain and establish?"

Had it been the intention of Congress to *constitute* these foreign consuls *judicial courts*, and to deposit with them a part of the judicial power of the United States, then the Act is to this extent unconstitutional.

Had it been the intention to attach judicial power to make final judgments and decrees involving the property, liberty and even life of the citizen, as a mere *incident* to a commercial agency, it is also unconstitutional. No man can constitutionally sit in final judgment, but a constitutional judge.

Neither can any sound argument in support of this abnormal system of jurisprudence be drawn from the necessity of having tribunals to administer our laws in non-christian countries; for wherever foreign nations have conceded to us the right to exercise judicial jurisdiction, it is perfectly competent for Congress to establish constitutional courts, with constitutional judges.

But whether we are right in this or not, it is perfectly clear, we think, that *foreign consuls* are not judicial courts of the United States. Vide Haybern's case, 2 Dall., 409; U. S. vs. Administrator of Pass, 13 How., 40; The American Insurance Co. vs. Canter, 1 Peters, 511; Dainese vs. Allen, 3 Abbott, 212.

From the foregoing, and well established legal propositions, we deduce the following

## SUMMARY.

1st. That no law or usage of Turkey confers any right on the part of the United States, to establish Consular Courts for the trial of civil causes, within the Ottoman Empire.

2d. That the right to establish exterritorial Consular Courts has no foundation in International Law, but rests entirely upon treaty stipulation.

3d. That neither the treaty of 1830, nor the treaty of 1862, between the United States and the Ottoman Porte, contains any grant of exterritorial jurisdiction, by virtue of which the United States have any authority to establish Consular Tribunals within the Ottoman Empire for the trial of civil causes.

4th. That without such grant of authority by the Sublime Porte, our Consuls could have no civil jurisdiction in Turkey, even in case Congress had vested them by law with the full power and authority to exercise such jurisdiction.

5th. That by Sec. 21 of the Consular Code of 1860, the United States Consuls in Turkey are vested with authority to "exercise jurisdiction in civil cases;" only

*a.* "Wherever the same is permitted by the laws of Turkey," and

*b.* "By its USAGES in its intercourse with the Franks or other foreign Christian nations."

*c.* That such jurisdiction not being permitted or granted by the laws of Turkey, and there being no "USAGES" on the part of Turkey from which such permission or grant can be derived; it follows that the limitations of the vested authority, are limitations of total exclusion, and that therefore the statute vests no authority whatever in consuls to exercise civil jurisdiction.

6th. That by the 21st section the provisions of the act and the laws of the United States are extended to Turkey only "so far as the same relate to crimes and offences committed by citizens of the United States," and for no other purpose. Hence it follows, that

the consul has no law to apply, in civil cases, even admitting his vested power and the grant of authority to exercise the same.

7th. That proceedings in attachment rest exclusively upon statutory enactment, and as now provided for by Federal Laws, could not be executed in a foreign country.

8th. Even admitting that our consuls in Turkey have a civil jurisdiction equal in extent to our Consuls in China, it follows that their civil jurisdiction extends only to disputes between citizens of the United States *in Turkey*.

9th. This is a case in which the property of a citizen of the United States, residing and being in Washington, is seized by the Consul-General in Egypt, upon the suit of another citizen of the United States, residing and being in New York; and in this the case is without parallel, either in principle or precedent.

10th. That whatever power our Consuls in Turkey may possess to hear and determine disputes between citizens of the United States residing there, is an executive and not a judicial power.

11th. That the seizure of the plaintiff's goods, by the defendant, was without authority of law, and a violation of the plaintiff's rights, and that the defendant is liable for all damage and injury resulting therefrom.

12th. The plaintiff, in his declaration, avers that the defendant seized his goods and did the wrongs complained of, with the malicious intent to injure the defendant. This averment is not traversed by the plea. Hence the plea is bad on demurrer, and would be so even if the action were pending against a judge of a regularly constituted judicial tribunal.

F. P. CUPPY,

S. S. HENKLE,

*Counsel for Plaintiff-in-Error.*

# SUPPLEMENT.

Sec. 21, Act of 1860, Stat. at Large, vol. 12, p. 72:

"*And be it further enacted*, That the provisions of this act, so far as the same relate to crimes and offences committed by citizens of the United States shall extend to Turkey, under the treaty with the Sublime Porte, of May seventh, eighteen hundred and thirty, and shall be executed in the Ottoman dominions in conformity with the provisions of said treaty and of this act, by the minister of the United States and the Consuls of the United States (appointed) to reside therein, who are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China for the purposes above expressed, so far as regards the punishment of crime and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey or its usages in its intercourse with the Franks or other foreign Christian nations."

Section 11, Act of 1866:

"SEC. 11. That the provisions of the act to carry into effect the treaties between the United States and China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls or other functionaries of the United States in those countries, and for other purposes, approved June 22, 1860, shall extend to Egypt; and the consul-general at Alexandria shall have the power prescribed by section twenty-two, of said act, for the consul-general, or consul residing at the capital of a country where there is no minister."—14 Stat. at Large, p. 310.

Article 4, Treaty of 1830:

"If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced unless the American Dragoman be present. Causes in which the sum may exceed five hundred piasters shall be submitted to the Sublime Porte to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested; and even when they may have committed some offence they shall not be arrested or put in prison by the local authorities, but they shall be tried by their minister or consul and punished according to their offence, following in this respect, the usage observed towards other Franks."

Article 1, treaty of 1862:

"All rights, privileges and immunities which have been conferred

on the citizens or vessels of the United States of America by the treaty already existing between the United States of America and the Ottoman Empire are confirmed now and forever, with the exception of those clauses of the said treaty which it is the object of the present treaty to modify; and it is moreover expressly stipulated that all rights, privileges or immunities, which the Sublime Forte now grants or may hereafter grant to, or suffer to be enjoyed by the subjects, ships, commerce or navigation of any other foreign Power, shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce and navigation of the United States of America."

Article 21, Treaty of 1862:

"It is always understood that the Government of the United States of America does not pretend by any article in the present treaty, to stipulate for more than the plain and fair construction of the terms employed, nor to preclude in any manner, the Ottoman Government from the exercise of its rights of internal administration where the exercise of these rights does not evidently infringe upon the privileges accorded by ancient treaties or by present treaty to citizens of the United States or their merchandise.

# IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1874.

FRANCIS DAINESE, PLAINTIFF IN ERROR,
*vs.*
CHARLES HALE, DEFENDANT IN ERROR. } No. 235.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

## ARGUMENT OF W. PENN. CLARKE,

ATTORNEY FOR DEFENDANT IN ERROR.

WASHINGTON, D. C.:
CHRONICLE PUBLISHING COMPANY PRINT.
1875.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

FRANCIS DAINESE
*vs.*
CHARLES HALE. } No. 235.

*Error to the Supreme Court of the District of Columbia:*

This is an action *ex delicto*, commenced by the plaintiff in error against the defendant, in the Circuit Court of the District of Columbia, the declaration in which is in the words and figures following, to wit:

1. The plaintiff, Francis Dainese, a citizen of the United States, and resident of the District of Columbia, sues Charles Hale, the defendant, for that, whereas, the plaintiff, on or about the twenty-third day of November, 1864, was possessed of certain goods, wares, and merchandise, then stored and situate in the city of Alexandria, and country of Egypt, and at Fantah and Minich in said country, which were then and there of great value, to wit: of the value of sixty-nine thousand three hundred and sixty-six dollars and sixty cents, lawful money of the United States.

2. And for that, whereas, the plaintiff, on or about the said twenty-third day of November, 1864, was the owner of divers credits and choses in action, which were then and there of great value, to wit: of the value of forty-nine thousand three hundred and twenty-three dollars and fifty cents, lawful money of the United States—the same being claims, credits, and rights in action against divers persons residing respectively in said cities and country of Egypt, who were then and there solvent, able, and willing to pay the same.

3. And for that, whereas, the defendant, a citizen of the United States, was, on and after the seventeenth day of September, 1864, and until recently, agent and Consul- General of the United States in said

country of Egypt, and as such was clothed with great power as towards the local government over the persons and property of those belonging to the flag he represented, but in point of fact possessing none of the powers and duties of the civil magistrate as between citizens of the United States, resident within the United States; and yet, in usurpation and abuse of his said power, and for the malicious purpose of injuring the plaintiff in his fortune and estate, the defendant did take cognizance of a certain controversy between the plaintiff and Richard H. and Anthony B. Allen, citizens of the United States, residing therein—neither the plaintiff nor either of the said Allens being, at the time of the commencement of said proceedings, nor during the pendency thereof, residents of, or temporarily sojourning within, the Turkish dominions; and did, under a pretended order of attachment, pronounced and ordained by himself, seize and attach the said goods, wares, and merchandise of the plaintiff; and did, by notices of garnishment under the said pretended order, and other malicious machinations, interpose and prevent the timely collection and settlement by the plaintiff of the said claims, credits, and choses in action; and so in this wise did, willfully, unlawfully, and maliciously, and under color alone of his said office and of the said pretended proceedings in attachment, seize, take, and distrain the said goods, wares, and merchandise, and prevent the collection and settlement of the said claims, credits, and choses in action, and the sale of said goods; and did, then and there, to wit: on or about the said twenty-third day of November, 1864, and on divers other days and times between that day and the date hereof, at the cities and country aforesaid, without right or authority of law, keep and detain the same for a long space of time, to wit: for the space of eleven hundred and sixty days then next following, whereby the plaintiff, for and during all that time, lost, and was deprived of the use of his said goods, wares, and merchandise, or the power to sell and dispose of the same, and thereby they, then and there, became and were greatly damaged and lessened in value; and the said claims, credits, and rights in action, by reason of the intervening insolvency, nomadic habits, and unstable character of the said debtors of the plaintiff, were irretrievably lost.

4. And for that, whereas, also, the said Charles Hale, on or about the said seventeenth day of September, 1864, to wit: at the city of Alexandria, in the country of Egypt aforesaid, seized, took possession of, and converted to his own use certain other goods, money, and securities for money, books, and papers of the plaintiff, of great value, to wit: of the value, then, of five thousand dollars, lawful money of the United States.

5. The plaintiff claims judgment of the value of the said goods and chattels, credits, and rights in action, money and securities for money, books and papers, with mesne profits and damages, which he estimates at one hundred and twenty-five thousand dollars, besides costs.

To this declaration the defendant pleaded, among other pleas, as follows:

SECOND PLEA.

2. And for a further plea to the first, second, and third counts of the said petition, the said defendant says, that at the time of the several trespasses and grievances in the said counts alleged, he was agent and Consul-General of the United States at Alexandria, in Egypt; that he was furnished with a letter of credence from the President of the United States to His Highness, the Pacha of Egypt; that in his capacity of agent and consul-general, and holding the highest diplomatic rank of any representative of the United States in the country to which he was accredited, he exercised, by virtue of the laws of the United States, the functions and duties of a minister; that as such agent and consul-general, by the law of nations, as well as the laws of the United States, he was invested with judicial functions and power over citizens of the United States residing in said country of Egypt; that in the exercise of said judicial functions and power, and in his capacity of agent and consul-general, as aforesaid, he took cognizance of the said cause of Richard H. and Anthony B. Allen *versus* the said plaintiff, he, the said Dainese, having a stock of goods then in store in Egypt, and issued the said order of attachment in the said plaintiff's petition alleged, under and by virtue of which the said proceedings in said petition alleged were had; that this, and none other, is the pretended trespasses and grievances in the said petition alleged; and that for the acts and doings of this defendant in the exercise of said judicial functions, in his capacity of agent and consul-general of the United States, he is liable only to the United States and the laws thereof, and not to the said plaintiff, and this he is ready to verify.

To this plea the plaintiff demurred, as bad in substance, and as required by the 34th rule of the Circuit Court, assigned on the margin thereof, as the substantial matter of law intended to be argued, as follows: "The plaintiff will argue that no such powers as those set up in the plea

were conferred upon the defendant, either by the law of nations or by the laws of the United States, and that in committing the grievances complained of he exceeded his authority and acted maliciously," thus making the demurrer a special one.

Upon joinder in demurrer, and after argument, the Circuit Court overruled the demurrer and held the plea good, whereupon the plaintiff refused to answer over, but stood on the demurrer.

The plaintiff then appealed to the Supreme Court of the District of Columbia, in which court, the judgment below, after full argument, was affirmed, and judgment rendered in favor of the defendant for costs. Thereupon the plaintiff sued out a writ of error to this court, and the only error assigned here is, that the Court below erred in overruling the demurrer to the plea, and rendering judgment for the defendant.

T e demurrer was properly overruled for this reason: Because the treaties between the United States and the Turkish Empire, and the laws of the United States, as well as the law of nations, confer upon the Consul General of the United States in Egypt judicial powers, both civil and criminal, over the persons and property of citizens of the United States in that country.

The consideration of the reason assigned involves an examination of the treaties between the Ottoman Porte and the United States, and the laws of the latter made in pursuance of those treaties. We have negotiated two treaties with the Ottoman Empire. The first was ratified February 2, 1831, the fourth article of which reads as follows:

ARTICLE IV. If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless

the American dragoman be present. Causes in which the sum may exceed five hundred piastres shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. *Citizens of the United States of America quietly pursuing their commerce, and not being charged or convicted of any crime, or offense, shall not be molested; and even when they may have committed some offense, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offense, following, in this respect, the usage observed towards other Franks.*

8 Stat. at Large, 409.

The second treaty between the two nations, which is the one now in force, was ratified June 5, 1862, the first article of which reads as follows:

ARTICLE I. *All rights, privileges, and immunities, which have been conferred on the citizens or vessels of the United States of America by the treaty already existing between the United States of America and the Ottoman Empire, are confirmed, now and forever*, with the exception of those clauses of the said treaty which it is the object of the present treaty to modify; *and it is, moreover, expressly stipulated that all rights, privileges, or immunities which the Sublime Porte now grants, or may hereafter grant, to or suffer to be enjoyed by the subjects, ships, commerce, or navigation of any other foreign power, shall be equally granted to, and exercised and enjoyed by, the citizens, vessels, commerce, and navigation of the United States of America.*

12 Stat. at Large, 1213.

The twentieth article (last paragraph) provides as follows:

The present treaty shall receive its execution in all and every one of the provinces of the Ottoman Empire, that is to say, in all the possessions of His Imperial Majesty the Sultan, situated in Europe or Asia, *in Egypt*, and in the other parts of Africa belonging to the Sublime Porte, in Servia, and in the united principalities of Moldavia and Wallachia.

12 Stat. at Large, 1217.

And the twenty-first article reads as follows:

ARTICLE XXI. It is always understood that the Government of the

United States of America does not pretend, by any article in the present treaty, to stipulate for more than the plain and fair construction of the terms employed, nor to preclude in any manner the Ottoman Government from the exercise of its rights of internal administration, *where the exercise* of these rights does not evidently infringe upon the privileges accorded by ancient treaties, or by the present treaty, to citizens of the United States or their merchandise.

12 Stat. at Large, 1218.

It will thus be seen that the treaty of 1830 conferred upon the minister or consuls of the United States in the dominions of the Sublime Porte entire jurisdiction over American citizens, "following the usage observed towards other Franks," and that the treaty of 1862, which now regulates the intercourse between the two nations, not only confirms the rights and privileges granted by the treaty of 1830, but extends to citizens of the United States all the rights, privileges, and immunities then granted, or hereafter to be granted, to the citizens of other foreign nations, and that this last treaty is extended expressly to Egypt.

Between the negotiation of these two treaties with the Ottoman Empire our Government had negotiated treaties with other heathen nations, that is to say, nations not professing the Christian religion, viz: China, Persia, Siam, and Japan, all of which provided that American citizens should be subject to the jurisdiction and regulated by the authorities of their own Government. That with China was concluded June 18, 1858, the twenty-seventh article of which reads as follows:

ARTICLE XXVII. All questions in regard to rights, whether of property or persons, arising between citizens of the United States in China, shall be subject to the jurisdiction, and regulated by the authorities, of their own Government; and all controversies occurring in China, between citizens of the United States and the subjects of any other goverenment, shall be regulated by the treaties existing between

the United States and such government, respectively, without interference on the part of China.

12 Stat. at Large, 1029.

The treaty with Persia was concluded December 13, 1856, and ratified June 13, 1857, the fifth article of which is substantially like the article above quoted from the treaty with China.

11 Stat. at Large, 710.

The treaty with Siam, concluded May 29, 1856, and ratified June 15, 1857, in its second article provides that "the interests of all American citizens coming to Siam shall be placed under regulations and control of a consul, who will be appointed to preside at Bangkok;" that "he shall give effect to all rules and regulations as are now, or may hereafter be enacted for the government of American citizens in Siam, the conduct of their trade, and for the prevention of all violations of the laws of Siam;" that any disputes arising between American citizens and Siamese subjects shall be heard and determined by the consul, in conjunction with the proper Siamese officers; that criminal offenses will be punished, in the case of American offenders, by the consul, according to American laws; and that the consul shall not interfere in any matter referring solely to Siamese, nor shall the Siamese authorities interfere in questions which only concern the citizens of the United States.

11 Stat. at Large, 684.

The treaty with Japan was negotiated July 29, 1858, and ratified May 23, 1860, and the sixth article expressly provides that Americans committing offenses against Japanese shall be tried in American consular courts, and when guilty, shall be punished according to American law.

12 Stat. at Large, 1056.

Consuls are commercial agents, whose duty it is to protect the persons and property of the citizens of the government by which they are accredited, and the foregoing citations from the treaties entered into by the United States with non-Christian nations illustrate how completely our citizens are placed under the control and protection of our consular officers by our Government. This is necessary, not only for our people who may have commercial relations between themselves, as well as with foreigners, but to secure obedience to the treaties thus negotiated, and preserve peace and amity between the governments. And Congress has wisely made provision for carrying said treaties into effect, by conferring ample authority upon our consuls to enforce their provisions, to which statute I now desire to call the attention of the court.

The act entitled "An act to carry into effect provisions of the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls or other functionaries of the United States in those countries, and for other purposes," approved July 22, 1860, (12 Stat. at Large, 72,) regulates this whole subject, and is a construction by Congress of the extent of the power thus conferred by the said treaties. The first section clothes ministers and consuls with judicial powers. The second section confers criminal jurisdiction. The third and fourth sections, which confer civil jurisdiction, and provide how it is to be exercised, read as follows:

SECTION 3. That in regard to civil rights, *whether of property or person*, the said functionaries *are hereby invested with all the judicial authority necessary to execute the provisions of such treaties, respectively*, and shall entertain jurisdiction in matters of contract at the port where, or nearest to which, the contract was made, or at the port which, or nearest to which, it was to be executed; and in all other matters at the port where, or nearest to which, the cause of controversy arose, or at the

port where, or nearest to which, the damage complained of was sustained; any such port above-named being always one of the ports at which the United States are represented by consuls—*which jurisdiction shall embrace all controversies between citizens of the United States,* or others provided for by such treaties, respectively.

SECTION 4. That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, extended over all citizens of the United States in the said countries, (*and over all others to the extent that the terms of the said treaties, respectively, justify or require,*) so far as such laws are suitable to carry the said treaties into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law, including equity and admiralty, shall be extended in like manner over such citizens and others in the said countries; and if defects still remain to be supplied, and neither the common law, including equity and admiralty, nor the statutes of the United States, furnish appropriate and suitable remedies, the ministers in the said countries, respectively, shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies.

12 Stat. at Large, 73.

The following sections, from five to twenty, inclusive, require ministers to prescribe forms of process to be used by the consuls; the mode of trial; the punishment to be inflicted; make it the duty of consuls to encourage the settlement of controversies by mutual agreement, or by arbitration; regulate fees; &c. Then comes the twenty-first section, which is as follows:

SECTION 21. That the provisions of this act, so far as the same relate to crimes and offenses committed by citizens of the United States, shall extend to Turkey, under the treaty with the Sublime Porte, of May 7, 1830, and shall be executed in the Ottoman dominions in conformity with the provisions of said treaty, and of this act, by the minister of the United States and the consuls of the United States (appointed) to reside therein, who are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China, for the purposes above expressed, so far as regards the punishment of crime, *and also*

*for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usage in its intercourse with the Franks or other foreign Christian nations.*

12 Stat. at Large, 76.

The twenty-second section provides:

SECTION 22. That the word minister, when used in this act, shall be understood to mean the person invested with and exercising the principal diplomatic functions in each of the countries mentioned in the first section of this act. That the word consul shall be understood to mean any person invested by the United States with, and exercising the functions of, consul-general, vice consul-general, consul, or vice consul, in any of the countries named. And if, at any time, there be no minister of the United States in either of the countries hereinbefore mentioned, the judicial duties, which are imposed by this act upon the minister, shall devolve upon the consul-general or consul residing at the capital of the country, who is hereby authorized and required to discharge the same.

And the twenty-third section reads as follows:

SECTION 23. That all such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular functionaries, respectively, but as judicial officers when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers.

12 Stat. at Large, 76.

It is apparent, then, that the act of 1860, by the sections quoted above, confers upon the ministers and consuls of the United States resident in the countries named in the act, not only criminal jurisdiction of the person, *but civil jurisdiction as well over the persons and property of American citizens* in said countries, so far as the same is permitted by the treaties existing between the United States and said nations; and that as to Turkey, this civil jurisdiction is only limited by that clause in the treaty of 1862, which restricts its exercise to cases "wherein the

same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks or other foreign Christian nations."

By the eleventh section of the act entitled "An act making appropriations for sundry civil expenses of the Government, for the year ending June 30, 1867, and for other purposes," approved July 28, 1866, (14 Stat. at Large, 310,) the act of 1860 is extended to Egypt, and the consul-general at Alexandria is clothed with the powers conferred by the twenty-second section of that statute. For the convenience of the court I copy the section, which reads as follows:

> SECTION 11. That the provisions of the act to carry into effect the treaties between the United States and China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls or other functionaries of the United States in those countries, and for other purposes, approved June 22, 1860, shall extend to Egypt, and the consul-general at Alexandria shall have the power provided by section twenty-two of such act for the consul-general or consul residing at the capital of a country where there is no minister.

14 Stat. at Large, 322.

The treaty with Turkey, of 1830, in express terms, extended to Egypt; the rights and privileges granted by that treaty were confirmed and enlarged by the treaty of 1862, and the twenty-first section of the act of 1860 conferred upon the minister and consuls of the United States in Turkey, of which Egypt then formed a part, the judicial authority to enforce said treaty, and protect the persons and property of American citizens in accordance with its terms, so that the eleventh section of the act of 1866 is merely declaratory of the law as it previously existed, and was intended to remove any doubt that may have been entertained upon the subject. It cannot, therefore, be claimed that the Consul-General of the United States resident in

Egypt had no judicial functions or authority till after the passage of the act of 1866, as this conclusion would leave American citizens and their property without protection.

The question then presents itself. What judicial powers and functions are our minister and consuls in Turkey authorized to exercise over the persons and property of American citizens in that country, or its provinces, under that clause in the fourth article of the treaty of 1830, which provides that "they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offenses, following, in this respect, the usage observed towards other Franks," and by the last clause in the first article of the treaty of 1862, which stipulates "that all rights, privileges, and immunities which the Sublime Porte now grants, or may hereafter grant, or suffer to be enjoyed by the subjects, ships, commerce, or navigation of any other foreign power, shall be equally granted to, and exercised and enjoyed by, the citizens, vessels, commerce, and navigation of the United States of America?" And to determine this question we must recur to the authorities, for the question is one of authority rather than argument. In the United States Consular Manual, a work published in 1863, under the auspices of the State Department, after the act of 1860 was enacted, and which is placed in the hands of every consul appointed by our Government for his instruction and guidance, the construction which the Government places upon our treaties with the Ottoman Porte, as to the rights of American citizens under said treaties, is thus stated:

> As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of "the usage observed toward other Franks." * * * * The phrase in the second article engages that citizens of the United States

in Turkey shall not be "treated in any way contrary to established usages." The "established usages" are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of—

1. Turkish tribunals for questions between subjects of the Porte and foreign Christians;

2. Consular courts for the business of each nation of foreign Christians;

3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation;

4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians;

5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts, an arrangement introduced first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christian nations.

Notwithstanding the apparent silence of the fourth article of the treaty upon the whole subject of the civil affairs of Americans, and the seeming reference of their crimes alone to the "usage observed toward other Franks," yet the engagement in the second article covers this ground by securing to Americans in Turkey, and consequently to the consuls of the United States, the same rights and privileges which are enjoyed by those of Austria, Great Britain, France, or Russia. This statement receives illustration from the tenor of all our treaties with the Barbary States. The earliest, that with Algiers, may be taken as a type. It provides in Article XV as follows:

"Any disputes or suits at law which may take place between the subjects of the Regency and the citizens of the United States of North America shall be decided by the Dey in person, and no other.

"Any disputes which may arise between citizens of the United States shall be decided by the consul, as they are, in such cases, not subject to the laws of the Regency."

Similar provisions in effect, though in different language, occur in the two treaties with Tripoli, and in the two treaties with Tunis. Although Morocco does not stand in the same qualified dependence on the Porte with Tripoli and Tunis, and, as formerly, the old Regency of Algiers, yet Americans are placed on the like footing there as in the

States of Turkish Barbary. A similar provision exists in the treaty with the Imaun of Muscat.

All these treaties, assuming and recognizing the same doctrine of public law, that is, the exterritoriality of the Americans, and the judicial, as well as diplomatic, authority of American consuls, serve to construe and explain whatever there is uncertain, obscure, or vague in the treaty with the Ottoman Porte.

U. S. Consular Manual, 72–75.

This is the authority under which each consul acts, and to which he resorts for instructions, not only as to his duties, but as to the functions with which he is clothed. And in it each of our consuls in the Ottoman dominions is instructed that in all civil affairs all Americans are wholly exempt from the local jurisdiction; that their exterritoriality is recognized by the Ottoman Porte; and that the only legal authority over them is that of their minister or consul, subject to the provisions of law prescribed by their own Government. If he is a lawyer, or a man of intelligence, he also looks into the standard American writers on international law, and he finds that the doctrine laid down in the Manual is sustained by those authors. Thus he finds that Halleck says:

As already remarked, the powers, privileges, and immunities of European and American consuls in Mohammedan and unchristian dominions are very different from those of consuls in Christian countries. This has resulted, in part, from their having there retained the general diplomatic character and prerogatives of jurisdiction which, in earlier times, they possessed everywhere, and, in part, from the stipulations of treaties. Thus the Sultans of Turkey have conceded to the consuls of Christian powers authority to exercise jurisdiction over their fellow-countrymen in Turkey, which, by the general rule of international law of Christian states, belongs to the territorial sovereign. Such jurisdiction, both civil and criminal, being conceded to the consuls over their countrymen, to the exclusion of the local magistrates and tribunals, it depends upon the laws of their own states how it shall be exercised, and what penalties or punishments may be imposed or in-

flicted. In civil cases jurisdiction is ordinarily subject to an appeal to the superior tribunals of their own country, and in criminal cases the prisoners are sometimes sent home for trial and punishment, especially if the punishment exceeds the infliction of pecuniary penalties. This, however depends upon the laws of their own country regulating such proceedings.

Halleck's Int. Law, 255.

And the author, in support of this doctrine, refers to the following authorities:

Wheaton's Inter. Law, pt. ii, chap. 2, sec. 110;
2 Phillimore's Int. Law, sec. 272;
Marten's Guide Diplomatique, sec. 83;
1 Wildman's Int. Law, 130;
Horne on Diplomacy, sec. 1.
7 Cushing Opinions, (Att'y Gen.,) 346.

The law is thus stated by Wheaton:

The municipal laws and institutions of any state may operate beyond its own territory and within the territory of another state by special compact between the two states.

Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise over their own countrymen a jurisdiction within the territory of the state where they reside. The nature and extent of this peculiar jurisdiction depend upon the stipulations of the treaties between the two states. * * * * The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties.

Wheat. Int. Law, part ii, sec. 110.

The reason for the difference in the powers of consuls

in Christian and in Mohammedan countries is founded, as stated by Mr. Caleb Cushing, when he was Attorney General of the United States, on the difference of law, which necessarily results from the character of the different religions. Mr. Cushing says: "The legislature of Mohammed, for instance, like that of Moses, is inseparable from his religion. We cannot submit to one without undergoing the other. The same legal incompatibility exists, for one reason or another, between us and the unchristian states not Mohammedan."

7 Opp. Attorney General, 346.

There is no conflict in the authorities upon this subject. The doctrines laid down by Halleck and Wheaton are recognized and sanctioned by all writers on international law; and the principle to be deduced from all of them is that in Mohammedan and other non-Christian countries the exterritoriality of the citizens or subjects of Christian nations are recognized, and that in the settlement of all controversies arising between themselves they are solely under the jurisdiction, civil and criminal, of their own ministers and consuls, under such provisions of law as the law-making power of their respective governments may prescribe. The treaty of 1862, between the United States and the Ottoman Porte, as I have already shown, placed our Government on the footing of the most favored nations, and secures to our people that protection to their persons and commerce (which means property) necessary for commercial operations. The act of 1860, to carry into effect our treaties with the non-Christian nations—including Turkey—as I have also shown, as to civil rights, *whether of persons or property*, confers judicial authority upon our ministers and consuls, and that jurisdiction extends not only to American citizens *in* those countries,

*but over all others* to the extent that the terms of the treaties, respectively, justify.

See sections 2 and 3, 12 Stat. at Large, 73.

And thus the judicial character of the defendant while Consul-General of the United States at Alexandria, in Egypt, is established. The plaintiff, in his declaration, avers that the defendant did not possess this judicial capacity, and also demurs to the plea of the defendant setting up the fact that, as such consul-general, he did the acts complained of as a judicial officer, on the ground that "no such powers as those set up in the plea were conferred upon the defendant, either by the law of nations or the laws of the United States," thus raising the mere issue as to the judicial functions of the officer. When, therefore, it is established that, as consul-general, such power and jurisdiction were conferred upon the defendant, it follows that the controversy is at an end, and that the demurrer was properly overruled.

This is the case made by the record, as I understand it, but it is not the question which the plaintiff seeks to raise, and I come now to the consideration of that question. The position of the plaintiff is, that in order to give the minister or consul in Turkey or its provinces jurisdiction over an American citizen, such citizen must either be domiciled or temporarily *in* the country; or, to take the case at bar as an example, that the *plaintiff must have been in Egypt at the time legal proceedings were commenced*, in order to give the consul-general jurisdiction of the case; and that if it should turn out, after such proceedings were initiated, that he was *not in* Egypt, the action of the officer would be void, and he become liable in damages. This position is fallacious, for the reason that it ignores the distinction between jurisdiction of the

*subject matter of the suit* and jurisdiction of the persons who are parties thereto, which are very different things. The theory of the plaintiff is, that our consular courts in Mohammedan and other non-Christian countries are inferior courts of *limited* jurisdiction, when in fact and in law, they are superior courts, of *general* jurisdiction over the property as well as the persons of every American citizen within their territorial limits. They have the right to act in every class of cases, both civil and criminal, in which an American citizen or his property can be made a party; and this constitutes a court of general jurisdiction.

The *test* of jurisdiction of a court is not the territorial limits to which it may be confined, but the *nature* of the cases of which it can take cognizance. A court may be one of superior and general jurisdiction, yet limited to a distinct portion of territory—as a court of inferior and limited jurisdiction generally is. Thus, a probate court is limited to the exercise of probate functions, and can exercise none others, and hence it is an inferior court of limited jurisdiction. It has no power to act upon any class of cases but those arising in the settlement of the estates of deceased persons, and the assumption of any authority or power outside of this class of cases would be absolutely void, and of no effect. They are inferior courts in every sense. So, a court which can only exercise jurisdiction in cases where the amount in controversy does not exceed a certain sum—say one hundred or five hundred dollars, as the may be—is a court of inferior and limited jurisdiction. In both of these cases the jurisdiction is determined by the nature of the cases or suits which it is authorized to entertain, not by the residence of the parties who may become litigants before the courts. The probate courts have complete, and often exclusive, juris-

diction over the property of estates within the territorial limits to which it is confined, as the county or district, and courts whose authority to act is limited to a certain sum or amount, are equally potent as to that class of cases.

On the other hand, the circuit and district courts of the United States are superior courts of general jurisdiction, though that jurisdiction is limited to a certain extent. Thus, these courts have exclusive jurisdiction of crimes and offenses cognizable under the authority of the United States, committed within their respective districts or upon the high seas; of all civil causes of admiralty and maritime jurisdiction, &c.; and of all suits for forfeitures and penalties incurred under the laws of the United States. They have also concurrent jurisdiction with the State courts in certain cases, not necessary to particularly specify here. They are tribunals established primarily through and by which the laws of the United States may be enforced, and though their jurisdiction is limited, they are none the less courts of superior and general jurisdiction. So far as it goes, that jurisdiction is unconditional as to the class of actions it was created to entertain, and its powers may be called into action whenever the parties or their property come within its territorial limits.

In *Simons vs. De Bare*, (4 Bosw., N. Y., 547,) the court thus defines a superior court: "To constitute a court a superior court [meaning a court of general jurisdiction] as to any class of actions, within the common-law meaning of the term, *its jurisdiction of such actions must be unconditional, so that the only thing requisite to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties.*" And in the *State vs. La Crosse*, (11 Wisconsin, 50,) it is stated: "It is the *nature of the jurisdiction*, not the territorial limits within which it

may be exercised, that determines whether a court is of inferior or general jurisdiction." Tried by these rules, can there be any question that the consular courts referred to are superior courts of general jurisdiction over the class of persons for whose protection they were created? They are authorized, not only to administer the laws of the United States, but the common law, where the former are found insufficient, and possess equity and admiralty, as well as civil and criminal powers, and not only so, but the ministers in those countries are invested with authority to make rules and regulations to supply any defects which may exist, which shall have the force of law. The laws of the United States are extended over all citizens of the United States in those countries, and over all others (*i. e.*, citizens *not* in those countries,) so far as the terms of the treaties may justify, and the ministers and consuls are clothed with jurisdiction, in regard to civil rights, over the property and persons of such citizens in all matters of contract. (12 Stat. at Large, 73.) Under this statute, thus constituting consular courts, and in persuance of the fifth section thereof, the American Minister in Turkey adopted rules for the regulation of the consular courts in that country, which provide for the issue of process and writs of replevin and attachment, and by which the practice and proceedings of the courts are regulated, thus showing that a regular system of jurisprudence has been established, as required by the statute. These rules have been approved by the State Department, and are now in full force, thus giving them the sanction of law.

It must be clear to the court, then, that the jurisdiction of our consular courts in Egypt is general over American citizens and their property in that country, and that its exercise is *not* dependent upon the fact, whether one or

both parties to a civil suit is *in* Egypt when it is commenced. Their jurisdiction is as general as the jurisdiction of the Supreme Court of the District of Columbia. Every American citizen finding in Egypt the person or property of his American debtor may prosecute his suit in that court. If the debtor is there in person he obtains personal service upon him, by means of the process prescribed by the court; if the debtor is absent, he attaches his property, and gets service in that way. If personal service is had, or the debtor appears voluntarily, the judgment rendered is as binding upon both parties, and can be enforced elsewhere, as though rendered in any other court; if the debtor is not served, and does not appear, then the judgment, if in favor of the plaintiff, is *in rem* against the property attached, just as it would be in any other court. In other words, our consular courts in Egypt are American courts, established for the benefit and protection of the persons and property of American citizens; and when either the one or the other come within their territorial limits, they are just as much subject to the laws of the United States and the common law as they would be if within the territorial limits of this court, or the courts of any State.

Any other construction than this would be inconsistent with the purpose of our treaties with the Ottoman Porte, which purpose is to open up and encourage commercial intercourse between the two nations, and thus lead to an interchange of the products of each. In order to carry on such relations, it was anticipated that American citizens would locate as merchants at the principal ports of Egypt, and this rendered it necessary that some tribunal should be created to which Americans could resort for the enforcement of their rights, as between themselves. And to limit the jurisdiction of the court thus provided to

those Americans only who went personally to Egypt, or to hold that a suit could not be entertained against one of them unless it appears he was *in* the country when the proceeding was commenced, would impair the usefulness of those courts, by depriving American merchants in the United States and elsewhere of any remedy against those Americans to whom they furnished merchandise for that trade, and thus not only conduce to fraud, but tend to prevent commercial intercourse itself.

The case at bar illustrates the truth of this last remark. What is it, as disclosed by the allegations of the pleadings, taking them together? The plaintiff can not controvert the allegations of his declaration, and his demurrer admits the truth of the facts stated in the plea. From these papers it appears:

1. That the plaintiff is an American citizen, and in November, 1864, was seized and possessed, *in Alexandria, in Egypt*, of "goods, wares, and merchandise, then stored and situate," in said city, and "at Fantah and Minich in said country," of "the value of sixty-nine thousand three hundred and sixty-six dollars and sixty cents, lawful money of the United States."

2. That at the same time, and in the same country, he "was the owner of divers credits and choses in action," of "the value of forty-nine thousand three hundred and twenty-three dollars and fifty cents, lawful money of the United States, the same being claims, credits, and rights in action against divers persons residing respectively in said cities and country of Egypt;" and that these persons thus indebted to the plaintiff were not merely Americans, but were subjects of the Ottoman Porte, is apparent from his statement in the third paragraph of the declaration, that "the said claims, credits, and rights in action, by

reason of the intervening insolvency, *nomadic* habits, and *unstable character* of the said debtors," where wholly lost to the plaintiff.

3. That on the 17th day of September, 1864, "*at the said city of Alexandria in Egypt*," the said defendant "seized, took possession of, and converted to his own use, certain other goods, money and securities for moneys, books, and papers of the plaintiff," of "the value of five thousand dollars, lawful money of the United States."

4. That the plaintiff having these goods, wares, and merchandise thus stored in Egypt, and the rights, credits, and choses in action against subjects of the Ottoman Porte and others, being persons residing in that country, the defendant, as agent and Consul-General of the United States in said country of Epypt, took cognizance of a *certain controversy* between said plaintiff and Richard H. and Anthony B. Allen, citizens of the United States residing therein, and under a pretended order of attachment, pronounced and ordained by himself, seized and attached the said goods, wares, and merchandise, and by notices of garnishment under the said pretended order, did interpose and prevent the timely collection and settlement of the said claims, credits, and choses in action, and under color alone of his said office and of the said proceedings in attachment, seize, take, and distrain the said goods, wares, and merchandise, and prevent the collection and settlement of the said claims, credits, and choses in action, and the sale of said goods.

5. That "*neither the plaintiff, nor either of the Allens, at the time of the commencement of said proceedings, nor during the pendency thereof, were residents of, nor temporarily sojourning within, the Turkish dominions.*"

These are the substantial facts of the petition, not controverted by the plea, and in the consideration of the question now before the court we are entitled to every legitimate inference that may be fairly drawn from the facts thus alleged. Now what are the natural inferences that arise from the plaintiff's statement of his own case? The first is, that he was a merchant doing business in Egypt—hence his stock of goods, wares, and merchandise; and that he was selling the same indiscriminately to the subjects of the Ottoman Porte and others—hence his claims, credits, and choses in action against persons of nomadic habits and unstable character. The second is, that he was either in Egypt personally superintending his business of selling goods, wares, and merchandise, or was represented by an agent, who carried on said business in the name of the plaintiff. And this inference is supported by the careful manner in which he alleges that neither himself nor the said Allens, "*at the time of the commencement of said proceedings, nor during the pendency thereof*, were residents thereof nor temporarily sojourning within the Turkish dominions," thus leaving it clear that prior to said proceedings the said plaintiff had been in Egypt. The third inference is, that the said Allens, "citizens of the United States," (but whose residence is carefully concealed from the court,) are also merchants, to whom the plaintiff was indebted for the very goods, wares, and merchandise he was then selling in Egypt; and that they followed him to that country to compel payment of that indebtedness. If to these facts and inferences we add the presumption, which naturally follows, that upon the appearance of the Allens or their agent in Egypt, in the prosecution of their claim, the plaintiff abandoned his property and clandestinely left the country, the court will see at once that, without such a tribunal as our con-

sular courts, American merchants selling goods to American citizens doing business in Egypt, would be without any remedy for the collection of their demands, the commerce of the country would be obstructed, and they would be the victims of every scoundrel whom they had trusted. The very necessity of the case requires such a tribunal as the laws intended to provide for the protection of our citizens in the dominion of the Ottoman Porte, and this court will hesitate, I doubt not, before so limiting its jurisdiction as to impair its efficiency.

I insist, then, that our consular courts in the Ottoman Empire are endowed with general jurisdiction over the property and persons of American citizens doing business in that country, whether in person or by an agent; that this jurisdiction is necessary for the protection of our merchants at home as well as those residing in the Turkish dominions; that where an American creditor finds the person or property of his debtor in those dominions, he may prosecute his claim in the consular court as in any court in this country; and that the jurisdiction of the court does not rest upon the mere fact of the *presence* of the debtor, and is not ousted by his clandestine abandonment of the country. Hence the demurrer to the plea was properly overruled, and I respectfully submit that the judgment below must be affirmed.

W. PENN CLARKE,
*Attorney for Defendant in Error.*

2 Hall R. on International Law
N 273

2. Phillipson -

3 Abbott Prac Reps
N 212

1 Howard N. 275
9, 1 N 244